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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 671

NATHAN SHURMAN AND LOUIS CHEBATT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 13-31) is reported at 219 F. 2d 282.

JURISDICTION

The judgment of the court of appeals (Pet. 32) was entered on January 28, 1955, and a petition for rehearing was denied on February 28, 1955 (Pet. 32). The petition for a writ of certiorari was filed on March 24, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals was precluded from remanding a case for a new trial and was required to direct the entry of a judgment of acquittal when it ruled that the evidence was insufficient to establish venue, petitioner having moved for a new trial in the district court specifying lack of venue as a ground, and having assigned as error on appeal the failure to order a new trial.

STATUTES INVOLVED

26 U. S. C. 2593(a):

> It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590(a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590(a).

28 U. S. C. 2106:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause

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and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT

Petitioners seek review of the judgment of the Court of Appeals for the Fifth Circuit (Pet. 32), remanding this case for a new trial upon reversal of the judgment of the District Court for the Northern District of Texas (R. 144-145) finding petitioners guilty of obtaining marihuana without payment of tax, in violation of 26 U. S. C. 2593(a).

The testimony from which the presumptions and inferences as to the place of commission of the offense were derived may be summarized as follows:

On July 22, 1953, at about noon, petitioners were apprehended by W. E. Naylor, a Texas law enforcement officer, in a car owned by petitioner Shurman, about 10 or 15 miles from Fort Worth, on the road from Weatherford within the Northern District of Texas (R. 21, 29). Marihuana was found concealed in the car (R. 24-27, 40). Naylor had received phone calls from William T. Findley, a federal narcotics agent, alerting him to the car's being en route from El Paso (R. 30-37, 42, 91-94).

Outside the presence of the jury, with respect to Shurman's motion to suppress evidence, Findley testified that he was working as an undercover agent in Dallas, Texas, in July 1953 (R. 64); that he had purchased marihuana on four occasions in

the first two weeks of that month from Shurman (R. 65-68); that on or about July 15 Shurman had told him that he and Chebatt were going to Juarez, Mexico, to purchase marihuana and heroin (R. 68-69, 71-72); that he, Findley, several times informed Naylor by telephone that he believed a car with the specified license number would be coming from Juarez or El Paso with narcotics (R. 69, 73); that petitioners had not been put under surveillance and Findley did not know whether they went to Juarez, Mexico or not (R. 72).

The marihuana found in the car was wrapped in part in a bag which bore the name and address of a shop in Juarez, and the remainder was wrapped in a Juarez newspaper dated the day before the arrest (R. 39-41). No heroin was found (R. 81-82).

Shurman testified that his trip to Juarez had been solely for the purpose of obtaining employment there as a saxophonist (R. 102, 108, 112); that he could not account for the presence of the marihuana except as a matter of vengeance arising from an altercation in Juarez (R. 104-107, 122); that he and Chebatt had left Juarez at about midnight and driven continuously throughout the night and morning until the time of the arrest (R. 101, 103, 111); that stops had been made to phone his wife from El Paso and to get gas (R. 103, 111, 127); that he could not recall the places where the stops for gas had been made (R. 127-128); and that he had not seen or talked with anyone other than Chebatt during the trip from El Paso (R. 103, 128-129).

Petitioners' motions for acquittal at the close of

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the government's case and at the close of Shurman's testimony were denied (R. 97, 131). The judge charged the jury, *inter alia* (R. 134):

> You must not only find the defendants guilty in the acquisition of the drug itself, but it is incumbent upon the government to prove the venue, and if you should find and believe that transaction occurred some other place other than in the Northern District of Texas, the defendants would be acquitted.

The jury returned a verdict of guilty (R. 141). Petitioners then filed motions for judgment notwithstanding the verdict and in arrest of judgment (R. 141-142), and a motion for a new trial (R. 142-143). These were denied.

The statement of points to be relied on upon appeal included the point (R. 157):

> 15. That the Court erred in denying the defendants' motion for a new trial.[1]

The court of appeals held that the rebuttable statutory presumption of venue from possession was rebutted by evidence that the marihuana had been obtained in Juarez or El Paso; and that there was therefore insufficient proof of venue to justify submission of the case to the jury. It thereupon

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[1] In their brief before the court of appeals, petitioners argued that the judgment should be reversed "and this cause dismissed" (p. 26), and stated that the question of error in failing to acquit because of lack of venue "arose on defendants' [motions for acquittal, judgment notwithstanding the verdict and in arrest of judgment] and Motion for a New Trial" (p. 8).

reversed the judgment and remanded the cause for a new trial (Pet. 23-27, 31).

ARGUMENT

Petitioners, who asked for a new trial on the ground that venue had not been proved, are not in a position to complain of the grant of their motion by the court of appeals. In this and all other controlling respects, the case is governed by *Bryan* v. *United States*, 338 U. S. 552, in which this Court reaffirmed the propriety of a grant of a new trial requested by the defendants themselves, even though the court of appeals in *Bryan*, as in the instant case, held that on the evidence adduced an acquittal should have been directed below.[2] As stated in *Bryan* (338 U. S. at 560):

> "* * * where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial." *Francis* v. *Resweber*, 329 U. S. 459, 462. See *Trono* v. *United States*, 199 U. S. 521, 533-34.[3]

Once it is determined that the court below had jurisdiction to order a new trial rather than a dis-

[2] This power to grant a new trial had previously been exercised without question. *Wiborg* v. *United States*, 163 U.S. 632; *Clyatt* v. *United States*, 197 U.S. 207.

[3] The recent decision in *Sapir* v. *United States*, 348 U.S. 373, in which this Court ordered a dismissal of an indictment, is distinguishable because the Court considered that the original judgment ordering dismissal was correct on its merits and found it unnecessary to pass on the appellate court's power subsequently to order a new trial. Moreover, that case is also distinguishable upon the basis stated in the concurring opinion of Mr. Justice Douglas that Sapir had not asked for a new trial.

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missal, there is no reason in this case for this Court to review the manner in which that jurisdiction was exercised. It must be assumed that the court was satisfied on the basis not only of the evidence which went to the jury, but also on the additional testimony received by the trial court on the motion to suppress, that the possibility of establishing venue under the indictment was not entirely foreclosed. In granting a new trial upon the record before it, the court of appeals was clearly within the statutory authority to remand for such further proceedings "as may be just under the circumstances" (*supra*, p. 3).[4]

CONCLUSION

The question presented in this case was decided below on the basis of its particular facts. No conflict of decisions of law is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL, 1955.

[4] While the court of appeals was, therefore, correct in ordering a new trial rather than acquittal upon the actual record before it, if the government concludes that it cannot establish jurisdiction in the northern district, it will of course be necessary to move to dismiss.

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